

**\*\*E-filed 3/22/11\*\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

BREANNE TUMBAGA,

No. C 10-4782 RS

Plaintiff,

v.

**ORDER RE MOTION TO DISMISS  
FIRST AMENDED COMPLAINT AND  
ORDER TO SHOW CAUSE RE  
FAILURE TO SERVE INDIVIDUAL  
DEFENDANT**

CONTRA COSTA COMMUNITY  
COLLEGE DISTRICT, et al.,

Defendants.

Plaintiff Breanne Tumbaga alleges that she suffered discrimination and harassment based on sex and disability at the hands of defendant James Mick Taylor, an instructor at Los Medanos College. Defendant Contra Costa Community College District, which operates Los Medanos, previously moved to dismiss certain claims in the original complaint. The motion was granted in part and denied in part, and Tumbaga was given leave to amend some of the claims. The District now moves to dismiss the Third, Fifth, and Sixth Claims for Relief of the First Amended Complaint. Pursuant to Civil Local Rule 7-1(b), this matter is suitable for disposition without oral argument.

Tumbaga does not oppose dismissal of the Sixth Claim for Relief, brought under 42 U.S.C. §1983. Good cause appearing, the motion is granted as to that claim, without leave to amend. The Third Claim for Relief asserts violations of California Education Code §§66250 *et seq.*, and the Fifth Claim for Relief is brought under Title IX, 20 U.S.C. §§1681 *et seq.* In both instances, the

District contends Tumbaga has failed to allege sufficient facts showing that the District acted with “deliberate indifference” towards remedying the alleged discrimination and harassment. *See Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 292-293 (1998) (concluding that school district cannot be “liable in damages under Title IX for a teacher’s sexual harassment of a student absent actual notice and deliberate indifference.”).<sup>1</sup>

Tumbaga’s opposition offers additional specific facts, not alleged in the complaint, to show the requisite indifference. On reply, the District acknowledges that those facts, if pleaded in good faith, would suffice to state a claim. Accordingly, the motion to dismiss the Third and Fifth Claims for Relief is granted, with leave to amend. Any amended complaint shall be filed within **10 days** of the date of this order.

Finally, it appears that individual defendant Taylor has never been served. Accordingly, plaintiff shall either: (1) voluntarily dismiss the claims against Taylor, (2) file proof of service of summons and complaint on him no later than April 14, 2011, or (3) appear at 1:30 p.m. on that date and show cause why he should not be dismissed from this action, without prejudice, for lack of prosecution.

IT IS SO ORDERED.

Dated: 3/22/11

  
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RICHARD SEEBORG  
UNITED STATES DISTRICT JUDGE

<sup>1</sup> The Title IX claim in the original complaint was dismissed, with leave to amend, for failure to allege that the District acted with deliberate indifference. Although the First Amended Complaint addresses the point, it does so only through overly conclusory allegations.